No. 87-1859

Supreme Court, U.S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1987

AIR TRANSPORT ASSOCIATION OF AMERICA,
DELTA AIR LINES, INC.,
PAN AMERICAN WORLD AIRWAYS, INC.,
UNITED AIRLINES, INC., AMERICAN AIRLINES, INC.,
NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC.,
AIR CANADA, USAIR, INC. and EASTERN AIRLINES, INC.,
*Petitioners,*

VS.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA; and
VICTOR CALVO, PRISCILLA C. GREW,
RONALD VIAL, LEONARD M. GRIMES, JR.,
and WILLIAM T. BAGLEY,
the members of and constituting
said Public Utilities Commission,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the failure of the Air Transport Association of America ("ATAA") to file a petition with the California Supreme Court for review of the decision of the California Public Utilities Commission ("CPUC") adopting General Order 107-B within the time prescribed by Section 1756 of the California Public Utilities Code bars it from now asserting any claim it might have raised in that petition.

## LIST OF PARTIES

The parties in the court below were the Plaintiffs/Cross-Appellants/Appellees ATAA; Delta Air Lines, Inc.; Pan American World Airways, Inc.; United Airlines, Inc.; American Airlines, Inc.; Northwest Airlines, Inc.; Trans World Airlines, Inc.; Air Canada; USAir, Inc.; and Eastern Airlines, Inc. and the Defendants/Cross-Appellees/Appellants CPUC and its commissioners, Stanley W. Hulett, Donald Vial, Frederick R. Duda, G. Mitchell Wilk, and John B. Ohanian, successors in interest to the commissioners named in the petition.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

The Respondent CPUC requests that this Court deny the petition filed by the ATAA for a writ of certiorari on the ground that each of its claims is barred by the doctrine of res judicata.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 833 F.2d 200 (9th Cir. 1987), rather than at 833 F.2d 299 (9th Cir. 1987) as indicated in the petition.

## JURISDICTION

Jurisdiction is asserted by the ATAA under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 1709 of the California Public Utilities Code provides in full:

> In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

Section 1756 of the California Public Utilities Code provides in pertinent part:

> Within 30 days after the commission issues its decision denying the application for a rehearing or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined.

The Full Faith and Credit Statute, 28 U.S.C. § 1738, provides in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they were taken.

## STATEMENT OF THE CASE

The CPUC hereby adopts and incorporates by reference the statement of the case set forth in the opinion below at 833 F.2d at 202-203.

## ARGUMENT

The opinion below, in a fair and well-reasoned manner, correctly dismissed each claim raised by the ATAA in its petition to this Court and should not be overturned. First, the Eleventh Amendment barred the District Court from exercising jurisdiction over the ATAA's claim that the CPUC had acted in excess of its authority under state law. *ATAA v. CPUC, supra*, 833 F.2d at 203-204; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984). Second, General Order 107-B is entirely consistent with the requirements of Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a). *ATAA v. CPUC, supra*, 833 F.2d at 204-206; *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 737 F.2d 1095, 1133 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). Third, once the ATAA filed a petition for a declaratory order with the Federal Communications Commission, the District Court lost whatever jurisdiction it may originally have had to consider the issue of preemption under the Communications Act, 47 U.S.C. §§ 151 *et seq Id.* at 206; *Federal Communications Commission v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). Finally, the ATAA was without standing to assert preemption under the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978, 47 U.S.C. § 1305(a)(1). *ATAA v. CPUC*, 833 F.2d at 207; *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2nd Cir. 1986).

More fundamentally, this Court should deny the petition of the ATAA for a writ of certiorari on the ground that each claim it raises is barred by the doctrine of res judicata. On June 1, 1983, the CPUC issued Decision 83-06-071, adopting General Order 107-B. Thereafter, on October 19, 1983, the CPUC issued Decision 83-10-090, denying applications filed by various parties, including the ATAA, for rehearing of Decision 83-06-071. Under Section 1756 of the California Public Utilities Code, those parties had thirty days to seek review of Decision 83-10-090 by filing a petition for a writ of certiorari with the California Supreme Court. On November 18, 1984, when no party had sought such review, that decision became final.

Federal courts are specifically required by the Full Faith and Credit Statute, 28 U.S.C. § 1738, to give the same preclusive effect to any judgment of a state court which would be given under the law of the State in which it is rendered. *Migra v. Warren City School Board of Education*, 465 U.S. 75, 80-81 (1984). Under the law of the State of California, a denial for whatever reason by the California Supreme Court, even without written opinion, of a petition to review a decision of the CPUC constitutes a judgment on the merits of all claims which were or could have been raised. *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366, 372-373 (1920); *Southern Pacific Transportation Co. v. Public Utilities Commission*, 716 F.2d 1285, 1289-1291 (9th Cir. 1984), *cert. denied*, 466 U.S. 936 (1984); *Pacific Telephone & Telegraph Co. v. Public Utilities Commission*, 600 F.2d 1309, 1311-1312 (9th Cir. 1979), *cert. denied*, 444 U.S. 920 (1979); *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 901, 160 Cal. Rptr. 124, 603 P.2d 41 (1979); *People v. Western Air Lines*, 42 Cal.2d 621, 630-631, 268 P.2d 723 (1954); *appeal dismissed for want of a substantial federal question*, 348 U.S. 859 (1954). Furthermore, under Section 1709 of the California Public Utilities Code, final orders and decisions of the CPUC shall be conclusive in any collateral action or proceeding. *People v. Western Air Lines, supra*, 42 Cal.2d at 31. Thus, the failure of a party to file a timely petition with the California Supreme Court for review of a decision of the CPUC precludes that party from litigating in federal court any claim it might have raised. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, 611, n.22 (1975). In the words of this Court,

> [T]hough the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so. . . ."

*Allen v. McCurry*, 449 U.S. 90, 96 (1980); *see also Migra v. Warren City School District Board of Education, supra*, 465 U.S. at 81.

Accordingly, by its failure to file a timely petition with the California Supreme Court for review of the CPUC's Decision 83-10-090, the ATAA is barred from asserting before this Court any claim it might have raised in that petition. That the ATAA now lacks a forum in which to assert those claims in no way changes this result. It has made its choice, and now must live with the consequences:

> "The predicament in which respondent finds himself is of his own making . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." *Reed v. Allen*, 286 U.S., at 198-199.

*Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401-402 (1981).

## CONCLUSION

The ATAA's petition for a writ of certiorari should be denied.

Respectfully submitted,

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